



POLICE DEPARTMENT

June 26, 2008

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Gaetano Fundaro
Tax Registry No. 911668
41 Precinct
Disciplinary Case No. 82339/06

The above named member of the service appeared before me on February 13, 2008,
charged with the following:

1. Said Police Officer Gaetano Fundaro, while assigned to Transit District #3, on duty, on or about February 7, 2006, at approximately 0800 hours, in the vicinity of 145 Street and St. Nicholas Avenue, New York County, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Officer inappropriately in sum and substance stated that an individual, identity known to the Department, wears Frederick's of Hollywood underwear, in the presence of said individual and other members of the service.

PG 203-10 Pg. 1, Para. 5 PUBLIC CONTACT-PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Michelle Alleyene, Esq. and Adam Sheldon, Esq.,
Department Advocate's Office, and the Respondent was represented by Stuart London, Esq.

The Respondent through his counsel entered a plea of Not Guilty to the subject charge
and a stenographic transcript of the trial record has been prepared and is available for the Police
Commissioner's review.

DECISION

The Respondent is found Not Guilty.

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SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called as witnesses, Wendy Quintanilla, Police Officer Laura Herrera, Sergeant Moise Tingué and Sergeant Herbert Soto.

The Department offered the out-of-court official Department interview of Lieutenant Gregory Faller and the tape and transcript of that interview was admitted into evidence under Department's Exhibits ("DX") 1 and 1A respectively.

Wendy Quintanilla

Quintanilla is currently a student attending college. She testified that she was previously employed by the Department's Cadet Corps for approximately two or three years where she was assigned clerical duties at Transit District 3. She left the Cadet Corps in 2007 to continue her pursuit of a Masters Degree.

Quintanilla stated that her relationship with the officers assigned to the command was "just business, you know. I come in and do my job and I leave." She knew Lieutenant Gregory Faller (Faller) "as ...the Lieutenant there" and characterized her relationship with him as "just business, you know. He was just my superior. I follow his orders, if anything." Quintanilla also said she knew the Respondent and added that their relationship was "just relatively business" and that "He was one of the officers there, and that's it" and "it wasn't like we exchanged any type of communication or anything like that."

Quintanilla stated that on February 7, 2006, she worked a 0600 to 1400 tour. At approximately 7:00 or 8:00 a.m. she was directed by Lieutenant Sala, the Administrative Lieutenant, to make photocopies. She then went from her office, which she shared with Sergeant

Tingue, to the photocopier located at the front of the command. While at the photocopier she heard Faller ask her "Hey, Cadet, what type of underwears do you wear, do you wear Hanes or Victoria Secret?" Quintanilla stated that she "was shocked" upon hearing that question and "just looked at him, and I said, 'That's personal,' you know, and then I just couldn't say anything else."

Quintanilla testified that when Faller asked her the question he was "sitting at the front desk" approximately 15 feet from her and she heard Faller's statement "very well" because "he said it loud."¹ At that point according to Quintanilla, Police Officer Herrera who was standing behind her told Faller, "You can't ask her that, that's a personal question."

Quintanilla stated that the Respondent and Tingue were also present when Faller made his comment. The Respondent was "right next to Lieutenant Faller and Officer Tingue was by the front desk." Quintanilla then heard the Respondent say to Faller "No, no, no, she wears" and "then I didn't hear anything else because I returned back to the copy machine." She also stated that Faller and the Respondent began to laugh and she knew they were laughing "because they were the only ones—he [the Respondent] said, 'No, no, she wears' I started doing my copies and they were like, 'Ha, Ha, Ha,' you know, like a giggle, you know. I just ignored it because I wanted to leave and go." Quintanilla noted "That's all I heard, 'she wears', but the rest I didn't hear it, I was finishing up my copies and I wanted to get out of there."

Quintanilla stated that she went to Sala's office after she was finished at the copy machine and on her way there she passed Tingue who was standing by the corner of the front desk. She stated that Tingue followed her into Sala's office and asked her "Are you okay? Are you all right, because you look bothered?" She stated that he knew she was bothered because he

¹ Quintanilla described the distance between her and Faller using locations in the courtroom as markers for the distance. It was then agreed to by all parties that the distance between them at the time of the incident was approximately 15 feet.

“saw it in my face.” Quintanilla indicated to Tingué that she was “fine” and reiterated that she “was just a little shocked.” She added that Tingué did not make any comments at the time she heard Faller and the Respondent make the statements.

When Quintanilla arrived in Sala’s office he asked her if she was all right and what occurred. Quintanilla informed Sala about Faller’s comment and she stated that Sala became very angry and told her “Don’t worry about it; we are going to take care of this.”

Quintanilla testified that she received a telephone call from Sergeant Soto of the Office of Equal Employment Opportunity (O.E.E.O.), that same day (February 7, 2006) and he informed her that O.E.E.O. received a phone call indicating that someone made a comment towards her and he asked her if she wanted to make a complaint. Quintanilla was nervous about making a complaint and told Soto that she did not “want to get into trouble.” She explained that because she was “just” a cadet she would get fired if she made the complaint. Soto assured her that she would not get into trouble and that she had a right to make the complaint. Quintanilla asked Soto if she could change her mind “later on” and he told her that she could but it was for her to decide. Quintanilla decided that she would make the complaint.

Quintanilla testified that approximately 3 to 4 days later she met with Sergeant Soto at One Police Plaza. Quintanilla was determined to make a complaint because Faller might victimize someone else. When she met with Soto she informed him that the people present during the incident were Faller, the Respondent, Herrera and Tingué.

On cross-examination, Quintanilla testified that she made a written record of Faller’s statement to her in a document titled the “Office of Equal Employment Opportunity Complaint of Employment Discrimination” (RX A). Quintanilla, after reviewing a copy of the document, stated that she recognized her handwriting where she described what occurred. She added that

she had signed the original form and the document was filed on February 7, 2006. Quintanilla acknowledged that at the time she wrote her statement everything was clear in her mind as to what happened on that date.

Quintanilla then read the text of her written statement into the record where she stated the following:

“Lieutenant Faller asked me what kind of underwear do I wear, if I wear regular Haynes or Victoria’s Secret. Officer Fundaro had something else—said something else, but I wasn’t able to hear what he said because they both began to laugh. Officer Herrera was near the arrest processing area said ‘You guys can’t ask her that, it’s private, personal thing.’ I was shocked, but I managed to say yeah. It’s different when you ask a guy that question, but when you ask a girl, it’s very personal. I walked away and saw Officer Tingue looking at me in a shocking way.” (RXA)

Quintanilla indicated that the form had a space for the listing of witnesses to the event and in that space she listed: the Respondent, Herrera and Tingue. She specifically did not list Faller’s name as a witness because she “figured because he was the one that said it....” When Quintanilla was asked “Now, you didn’t put on that document: I heard Fundaro state, “Oh, no she wears ...?” she replied “Correct, but I did hear him say something.” She reiterated that while she heard the Respondent say “something else,” she “wasn’t able to hear him because they started laughing.” She stated that “I heard a portion of it. But I figured then it doesn’t mean anything because I only heard a portion of it.” Quintanilla acknowledged that she did not write down that she heard only a portion of the Respondent’s comment; she wrote that she did not hear what he said. She added that she did not file an E.E.O. Complaint against the Respondent; nor

did she prepare any piece of paper stating that she heard the Respondent say “Oh, no, she wears....”

Quintanilla also spoke about the incident to Captain Rodriguez, who was in charge of Transit District 3, and he became “very angry” when she told him what Faller had said to her. Quintanilla acknowledged that when she spoke to Rodriguez, she did not tell him that she heard the Respondent say “Oh, no, she wears;” instead, she told him that another officer made a comment, but she was unable to hear what was said.

Quintanilla acknowledged that on February 7, 2006, the day of the incident, she received two telephone calls from Soto: during the first call (at 1236 hours)² when Soto advised her that she had the right to proceed if she chose to and where she told him that she did not want to get anybody in trouble. Quintanilla further acknowledged that during that phone call she explained to Soto what happened with respect to Faller and that Faller apologized and wanted to make sure everything was okay with her. Quintanilla also told Soto that Faller told her he wanted to buy a gift for his niece and did not mean to offend her. During that phone call, however, she did not tell Soto that the Respondent made the comment “‘Oh, no, she wears,’ but I never heard the rest.”

Quintanilla acknowledged that she had a second telephone conversation with Soto (at 1333 hours) on the same day. According to Quintanilla, during that conversation she was going to proceed with the complaint, but she never told Soto that the Respondent made the statement about, “Oh no she wears...” Quintanilla further acknowledged that she never mentioned the “Oh, no, she wears” comment in the E.E.O. Complaint report she filled out on February 7, 2006. On February 9, 2006, Quintanilla was interviewed by Department investigators, Soto and St.

² Quintanilla could not remember the exact time of the calls and it was stipulated to by both parties that the calls were made at 1236 hours and at 1333 hours.

James and was asked questions about the incident with Faller. She remembered telling Soto that the Respondent was standing next to Faller at the front desk when Faller made the comment and again told them that the Respondent also said something, but she was unable to hear what he said because “everybody” was laughing. While Quintanilla noted that by “everybody” she meant the Respondent and Faller. She acknowledged that she told Soto that she did not hear what the Respondent said.

Quintanilla told Soto and St. James how Faller apologized to her, and told her that the only reason he asked that question was that he wanted to buy a gift for his niece. Quintanilla acknowledged that she told Soto and St. James that Faller was a rude person and rude towards women.

During that interview Quintanilla was asked by Soto: “You said that as you walked away, officer Fundaro made a statement. Do you know what it was?” and she answered “...I didn’t hear it because once Lieutenant Faller said something, Fundaro had said something else, he—he said, ‘No, no, no, she wears,’ I didn’t hear anything else because when you make copies the copy machine makes a lot of noise and they were laughing so I didn’t hear what he said.” Quintanilla explained that while the photocopier “was pretty loud” it was a combination of both the copy machine and laughing that prevented her from hearing what was said. “More the machine because the machine is louder.”

After Faller made his comment Quintanilla stood by the copier for “a couple of seconds.” She then walked away from the copy machine and then “vaguely” heard the Respondent say “Oh, no, she wears.” Quintanilla stated that she did not know if the statement was directed towards her and “ignored it because I didn’t want to be there anymore. I really didn’t want to make this a big deal. I just wanted to leave.”

Quintanilla said she never had any problems with the Respondent in the past nor was he ever rude to her. Quintanilla stated that when she was leaving the command that day the Respondent approached her and said "Are you okay, because I didn't mean--you know, if I offended you in any way, I am sorry."

On re-direct examination, Quintanilla said the complaint against Faller was written on the same day as Faller's comment, February 7, 2006. Quintanilla stated she was not given an opportunity to write down what the Respondent said because she was told to "just write, you know, what happened, what you remembered." Quintanilla did not document what the Respondent said because "I figured since I didn't hear everything else, it didn't make sense for me to put it in there, because I just heard that vaguely and then I was like: Well, it doesn't make sense to put half of it."

On re-cross examination, Quintanilla acknowledged that the Respondent may have been referring to Faller's statement when he asked her if she was all right. Quintanilla stated that during the telephone conversation with Soto she did not volunteer information about the Respondent because she "was just waiting for his questions."

Quintanilla was also asked the following questions at trial and gave the following answers regarding her perception of the Respondent's statements.

Question:	You were not offended by what you perceived Fundaro stated; correct?
Answer:	No, because I didn't hear it.
Question:	You didn't hear it so you weren't offended by it; correct?
Answer:	No, no.
Question:	That's why you didn't mention it; right.
Answer:	No.
Question:	That's why you never made a complaint against him; right?
Answer:	Right.

Police Officer Laura Herrera

Herrera is a 12-year member of the Department currently assigned to Transit Bureau. On February 7, 2006, Herrera was assigned to Transit District 3 as an arrest processing officer. Herrera testified that on that date she was working from 0700 to 1523 hours. Herrera stated that she was usually in the cell area while performing the duties of the arrest processing officer and that the cell area is "right adjacent to the desk area." She knew Faller as the midnight Lieutenant and characterized her relationship with him as "business." She also knew the Respondent and characterized her relationship with him as friends and co-workers.

Herrera stated that she was "by the front desk, where the cell area is" at approximately 8:00 a.m. on February 7, 2006. Faller was also "behind the desk" and the Respondent was "behind the desk, also adjacent to Lieutenant Faller" and he was stationed to the left of Faller. She testified that she heard Faller say to Quintanilla, "Wendy, what kind of underwear do you wear?" Herrera stated that Quintanilla was by the copy machine making photocopies at the time of Faller's comment.

Herrera described Quintanilla's reaction to the comment as she "was in shock, she was surprised" and she responded to the Lieutenant's comment by saying "Oh, my, gosh," "Oh, my God." Herrera then asked Faller "What kind of question is that?" because she "found it inappropriate for him to make a comment like that." Herrera noted that Faller responded to her by saying "You can tell about a person, about the type of underwear that they wear."

Herrera testified that she did not hear anyone else say anything because she walked away from the desk area. She did, however, hear that the Respondent "was about to say something, [but she] didn't hear anything that was said." Herrera explained that she heard the Respondent's voice but "didn't hear him say anything."

On cross-examination, Herrera said she heard the Respondent "as he was speaking, but I didn't hear what was said because I walked away." Herrera also stated that she walked by the Respondent as she was leaving and she was approximately one to two feet away from him as she left the area. She added that she was standing one to two feet away from the Lieutenant's desk "by the front where the entrance is to the cell area" when Faller made the statement to Quintanilla. Herrera stated that she never heard the Respondent say the words "she" or "No, no, no" "Fredericks," or "wears," nor, did she hear any laughing after Faller made his comment to Quintanilla. She stated that the Respondent was approximately three to four feet from Faller and to the left of him and that Faller was located at the front desk facing the copier machine. She added that she was not aware of any reading materials possessed by Faller. Herrera also testified that she did not know where Quintanilla was when she responded to Faller's statement and she did not hear Tingue say anything because she walked away. Herrera stated that "the only person I heard say anything at that time was Lieutenant Faller."

Sergeant Moise Tingue

Tingue is a 15-year member of the Department currently assigned to P.S.A. 2. Prior to his current assignment, Tingue was assigned to Transit District 3 in his previous rank of police officer, and was working a day tour on February 7, 2006. Tingue stated that at approximately 0800 hours, he "was at the [front] desk area, by the doorway of the desk area, behind the desk, itself." Tingue noted that Faller, the Respondent, Herrera and Quintanilla also were present in the area of the front desk. Tingue stated that his relationship with Faller and the Respondent was a business relationship.

Tingue testified that Faller was seated behind the desk, on the left side, which Tingue said was to his right side and the Respondent was located "on the other side" of Faller at the desk. Herrera was near the photocopy machine, "which when you walk into the command, would be on the left side." Tingue noted that Quintanilla was also at the copy machine making copies.

Tingue heard Faller make "a comment in reference to what kind of underwear Cadet Quintanilla wore, whether it was Hanes or -- I forgot the other, I don't recall exactly the other word, but something in reference to the underwear." Tingue was then asked if Victoria's Secret was the other reference to underwear that Faller mentioned and he replied "That's exactly what was said." Tingue knew that Faller directed his comment to Quintanilla "because he asked the cadet that directly." When Tingue heard Faller's comment he was "kind of shocked and taken aback by the statement." Tingue said Quintanilla, who was at the copy machine in front of Faller when he made the comment, was also "shocked" and "her mouth dropped open and she stood up straight and her eyes opened wide." He then heard Herrera "make the comment that Lieutenant Faller cannot ask her a question like that, that's not an appropriate question to ask...."

Tingue testified that he heard the Respondent make a comment after Faller's comment. He stated that while standing behind the Respondent "the only thing I heard from his mouth at that time was ... 'Fredericks' [and] nothing else." He stated that he did not hear the Respondent say "fucking Fredericks" and he could not remember who the Respondent was talking to when the Respondent said "Fredericks" because he was focused on Faller after Faller made his comment. Tingue stated that Quintanilla was "still in the area" when he heard the Respondent say "Fredericks" but was unable to recall if the copier was on at that time.

Tingue noted that “there was a little laughter after all the comments were made” and he also laughed after Faller’s comment because he was amazed that Faller would make such a statement. Tingue explained that he thought it was a foolish act on Faller’s part.

On cross-examination, Tingue acknowledged that Faller had a reputation for making inappropriate comments towards women. While he heard the “rumors” about Faller, he never witnessed any rude comments himself. Tingue’s description of the distance between where Quintanilla was standing and where Faller was at the desk indicated that they were approximately 15 feet from each other and Herrera was a “few feet” from Quintanilla. Tingue acknowledged that the Respondent was only a few feet from Faller at the desk and that he was closer to the Respondent than he was to Faller. Tingue could not recall if Faller had a newspaper in front of him and “wasn’t aware” that Faller had a Fredericks of Hollywood magazine tucked inside his newspaper behind the desk.

Tingue acknowledged that after Faller made his comment to Quintanilla, Herrera then made her comment to him. Tingue stated that the Respondent made his comment of Fredericks “maybe a moment after (Faller’s) comment was made” and Herrera made her statement to Faller after the Respondent’s comment.

Tingue stated that Quintanilla left very quickly, “close to five seconds” after Faller’s statement and walked by the Desk area, past him, after she was finished making copies. Tingue did not know who Fundaro directed his comment towards.

Sergeant Herbert Soto

Soto is a 14 ½ year member of the Department currently assigned to the Office of Equal Employment Opportunity (OEEO). His duties are to investigate allegations of disparaging

treatment based on age, race, gender, and also cases involving victims of domestic violence. Soto testified that he became involved in the investigation of this case on February 7, 2006 at approximately 1230 hours, when Lieutenant Sala of Transit District 3 called OEE0 informing him that at 0800 that day a cadet was the victim of a disparaging remark by a Lieutenant Faller. During the telephone call with Sala, Soto also had a conversation with Cadet Quintanilla to ascertain the facts of what transpired during the incident and he also informed her of her rights with regards to any potential investigation that might take place.

Soto testified that during that telephone conversation he asked her questions about the facts of the case and she answered his questions. He acknowledged that his questions were relevant to what took place on that day. He stated that there was a second phone conversation with Quintanilla and he again asked her questions about the case and she also gave answers to those questions.

During those initial phone calls, Soto did not ask Quintanilla questions regarding any allegations of misconduct committed by the Respondent because his focus was the allegations being made against Faller. During his conversations with Quintanilla, he scheduled an interview with her to take place on February 9, 2006. During that first interview with her, he was aware that the Respondent was involved in the case, but only as a witness.

Soto testified that an OEE0 "Complaint of Employment Discrimination" form was prepared for Quintanilla in this case. (RX A) He testified that at the bottom of the document there is a space that is provided for complainants to "basically outline what their allegation is." Soto stated that "during the complainant interview on February 9, the cadet did mention to me that she did hear Fundaro make a comment, but couldn't hear the entire comment." He subsequently interviewed Quintanilla and "she did tell me that after Faller made his comment,

she heard the Respondent make another comment which was to the effect, in quotes 'No, she is a ..., ' but she could not hear the rest of that...." because as she was making copies, the noise of the copier and the laughter of Faller and the officers that were present drowned out the Respondent's comment." Quintanilla stated that it was Faller and the Respondent who were laughing after the comment.

Soto further testified that he then interviewed Herrera and that her statements were consistent with the statements that Quintanilla made. He further explained that the consistency he was referring to pertained to the comments Faller made.

Soto interviewed Tingle on February 14, 2006 and subsequent to that interview, Soto concluded after the three interviews that he conducted, that "Fundaro made the statement 'She is a Frederick's of Hollywood girl.'"

Soto also interview Lieutenant Faller and that interview took place on February 28, 2006. During that interview, Faller admitted to making the comment to Quintanilla about her underwear. Also during that interview, Faller informed Soto that the Respondent said that "she is a Frederick's of Hollywood kind of girl." Faller also told Soto that the Respondent was seated at the front desk approximately 3 or 4 feet away from where Faller was stationed and his reaction to the Respondent's statement was one of "shock." (DX1 and 1A)

Soto reached out to the Respondent on March 1, 2006 to inform him of his investigation. Soto noted that at that time the Respondent was a PBA delegate and during the course of Soto's investigation the Respondent did not make any official report or complaint to OEEO or to any other investigative body with regard to this incident.

Soto interviewed the Respondent on March 20, 2006. During that interview a recess was taken and certain statements made by the Respondent prior to the recess were inconsistent with

statements made after the recess. In explaining this inconsistency Soto stated "I did ask the Respondent if he had heard - - if he made any statements to Faller at the time. He said no, he did not make any statements to Faller, nor did he have any conversation with Faller. We took a break. After the break, he then said that he did make - - he did make a statement to Faller." Soto recalled asking the Respondent the following question and receiving the following answer during that interview: "While you were at the front desk, before you went to the meeting on February 7, did you have any conversation with Faller? Answer Police Officer Fundaro: No."

Soto acknowledged that prior to the break in the interview, the Respondent indicated that he heard Faller make a statement regarding the cadet's underwear. The Respondent "heard Faller make the statement, but he doesn't know who it was directed at." In addition, Soto stated that once there was a break in the interview he told the Respondent's counsel that he had witnesses that heard the Respondent make a comment about Frederick's. After the recess the Respondent told Soto that he did make statements to Faller. He told Faller "Why don't you go to fucking Frederick's?" Soto noted that prior to the recess the Respondent made no mention of Frederick's, nor did he mention anything about using profanity towards Faller. Soto also noted that Faller never made any mention that the Respondent used profanity towards him; nor did he make any complaints against the Respondent for using profanity towards him. In addition, Faller never told Soto that he had a newspaper or magazine with him during the incident and there were no other witnesses that he interviewed, including the Respondent, that indicated that Faller had a Fredericks of Hollywood magazine when he made the comment to Quintanilla.

On cross-examination, Soto stated, in contrast to his direct testimony, that prior to the recess of the Respondent's interview the Respondent did in fact tell him that he heard Faller state, "Where did you buy your panties from." Soto acknowledged that it was after the recess that the Respondent told him that he made the comment to Faller, "why don't you fucking go to Frederick's." Soto reiterated that his determination that the Respondent's comment was "She is a Frederick's of Hollywood girl" was the direct result of what Faller told him during his interview. He acknowledged, however, that other than what Faller told him, neither Herrera nor Tingue heard that exact quote; Tingue only heard the word "Frederick's" and Herrera did not hear the Respondent say anything regarding that statement. In addition, when Quintanilla was interviewed she told Soto that she heard the Respondent say, "she is a ...," but did not hear him say anything else.

Soto further acknowledged that when he interviewed Quintanilla during his two telephone conversations with her, she never mentioned that the Respondent said anything. In contrast to his prior testimony, Soto stated that when he subsequently interviewed Quintanilla she actually told him that she only heard the Respondent say "no, no, no, she wears..." and not "She is a..." as he previously testified. He explained that during his prior testimony he "was doing a sum and substance comment. I wasn't reading off the transcript."

While Soto acknowledged that the statement "She wears" is different from the statement "She is a Frederick's of Hollywood girl" he never re-interviewed Quintanilla about the differences in the two statements; nor did he ask Faller during his interview whether he was certain that the Respondent actually stated "She wears" Frederick's of Hollywood underwear as apposed to "She is" a Frederick's of Hollywood girl. Soto nevertheless agreed that "she wears" and "she is a" are not the same statements. When Soto was then asked which statement did he

believe the Respondent made he replied, "I could go with what Fundaro told me." He added that he "wouldn't know" whether it was Quintanilla or Faller who was telling the truth or lying to him regarding their version of the Respondent's statement.

Soto acknowledged that on February 14, 2006, a few days after the incident, he informed Faller that an OEE0 complaint was made against him and had Faller sign a document to that effect. When he gave Faller the notice regarding Quintanilla's allegations of his statement to her, Faller's immediate reaction was to tell Soto that Quintanilla had lied on the document containing her official written OEE0 complaint against him. Soto concluded, however, that based on his investigation it was actually Faller who lied with regard to his allegation that Quintanilla had lied. Soto acknowledged that Faller went even further with his accusations of Quintanilla lying and told Soto that he could take legal action against her. Soto did not question Faller regarding his allegations of the cadet lying because Soto told him not to make any further comments without counsel present. Soto added, however, that even though Faller lied to him he did not feel that any comments Faller made about other officers were not truthful.

During Faller's official interview Faller never told him that he made a complaint against the Respondent for making a discourteous comment to Quintanilla, even though he initially claimed to be offended by the statement and it would have been his responsibility as a supervisor to do so if he heard the comment. Soto acknowledged that Faller told him that he never made a complaint against the Respondent because he did not feel anyone was offended by it.

Soto acknowledged that in the original OEE0 complaint where Quintanilla in her own words stated the facts of the case, she did not make any mention of the Respondent. It was only after his interview with Faller that the Respondent became a subject in this case. When that occurred Soto did not have Quintanilla fill out a supplement OEE0 complaint against the

Respondent, nor did he have her fill out any paper work to indicate what the Respondent stated. In addition, Quintanilla never formally made a complaint against the Respondent.

During the Respondent's official interview, Soto never asked him whether there was any reading material in front of Faller at the time he told Faller "why don't you fucking go to Frederick's."

On re-direct examination Soto acknowledged that it was only after Faller consulted with an attorney during his official interview that he told Soto about the statement he actually made.

Official Department Interview of Lieutenant Gregory Faller

An official Department interview was conducted of Faller, on February 28, 2006, by Soto and Detective Johnson. Faller stated that while he was assigned to Transit District 3 he knew a cadet by the name of Wendy Quintanilla and his relationship with her was friendly and professional.

Faller acknowledged that on February 7, 2006, he was working as the platoon commander during a 2315 by 0950 tour in Transit District 3. Faller was asked whether he had asked the cadet a question regarding her underwear and he responded by saying that he has had conversations with Wendy "about grooming, every time I get a hair cut she mentions it, her clothes, style, things like that, we've had conversations about those kinds of things in the past. So um I attempted to ask her a question and before I asked her actually the question I wanted to ask her, I had asked her a question prior to that. The first question that I asked her was um are you a Hanes or a Victoria Secret kind of girl? Now the question that I wanted to ask her, and I guess I should have asked her first is um I wanted to ah give her a certificate for my niece for

Valentine's Day and I was wondering if she could help me determine the monetary amount of that card or gift or whatever because I don't know anything about that stuff."

Faller stated that this was the first time that he had asked Quintanilla about her underwear and he explained that it was because of the gift certificate and that he did not "have any interest in knowing what kind of underwear she has." He further explained the reason for asking Quintanilla if she was a Hanes or a Victoria Secret type of girl was because he "wanted that question to inspire her sense of style, almost like putting on your thinking cap. Like if I said to you, hey put on your thinking cap when it comes to mechanics you know or quote, unquote, are you ... a Chevy or Cadillac kind of girl, it's the same thing. It didn't, it didn't, it wasn't supposed to be, or it definitely isn't on my part anything sexual."

When Faller was asked if the Respondent made any comments he stated "Yes he did. Interrupting, actually interrupting my line of, my conversation with Wendy, um he said, I made my statement and he said 'oh, she's a ah Frederick's of Hollywood kind of a girl' which I guess is, is a little racier than um Hanes or Victoria Secret." He further explained that when the Respondent made the statement "I immediately, well he laughed, the girl standing in front of me laughed, and Wendy herself laughed, and I said, and I immediately put a stop to it I said 'Whoa, Whoa, stop,' I said that's not what I meant. Like I didn't want it to, you know I didn't want it to lead that way, I didn't, it wasn't suppose to be funny what I was trying to accomplish you know the question.... So I immediately said 'Whoa, Whoa, that's not what I am talking about.' I said 'I'm not trying to offend anybody, I'm not trying to, to make fun of the situation so nobody's embarrassed, that wasn't my intention.'"

When Faller asked Quintanilla his question she was standing by the copy machine approximately 10 to 12 feet away from where he was seated at the desk. He further explained

the reason he wanted everyone to stop laughing after the Respondent made his statement was because "Wendy is a very nice girl, a very nice person, very thoughtful, very caring and I didn't want whatever was said to embarrass her in any way so that's why I immediately said, 'no, stop, that's not what I mean,' you know what I mean. Because he brought it to a humorous level, which is not where I was."

When Faller was asked what was the distinction between Hanes and Victoria Secret he explained that "Hanes would be like a Chevy and Victoria Secret would be like a Cadillac...it's an upscale I guess garment.... Well if she would have answered the question, which she didn't have time to do, she would have said I'm a Hanes girl and I would have said never mind, forget it, because I was looking for an answer to the second question. The second question would have been you know how much should I spend at Victoria Secret, you know how much is a gift card? Like I don't know how much ladies spend."

Faller stated that no one who was present at the time said anything to him regarding his comment to Quintanilla. When Faller was asked if Quintanilla asked him why he had asked her that question, Faller replied "Fundaro left the desk. He went to see if she was offended by him, by what he said and he came back and he said to me, he goes she is not offended, she took it as a joke. I said okay, good, because I didn't want her to be offended and so he told me that she took it as a joke and she thought it was funny and I said okay, fine. Half hour after that she, she said to me, she was in talking to the Administrative Lieutenant, well she was filing in there anyway and ah somebody said that she might be offended. So I walked to the back and I asked her if I could speak with her. I told her what you know what was ...what I meant and at that time I made another apology, you know, after the first, I, I said 'Whoa, Whoa that's not what I meant.' At this time I told her again that's not what I meant and she was fine with it."

Faller told Quintanilla, in a subsequent conversation with her, “exactly why I asked her the first question, and that was to get to the second question, about the buying of the cards for my niece and at that time she said ‘oh okay, now it all makes sense,’ that’s what she said, ‘now it all makes sense.’” He stated that he had this conversation with Quintanilla in front of the Administrative Lieutenant’s office and no one else was present during that conversation.

When Faller was asked why he did not call OEEO and report the Respondent for making the statement to him Faller replied “because everything happened relatively quick. If you, what happened is I said what I said, he said what he said then I right away said I don’t want anybody to be embarrassed by this and she laughed, which I thought was a signal of, of not having a problem with it and I didn’t think that what he said ah noted um a notification to your office.”

The Respondent’s Case

The Respondent testified in his own behalf.

The Respondent

The Respondent is a 14 ½ year member of the Department currently assigned to the 41 Precinct. He testified that on February 7, 2006 at approximately 0800 hours, he was assigned as the T/S operator at the front desk in Transit District 3. He explained that the T/S operator answers the telephones and takes messages. Also present at that time was Lieutenant Faller, Officer Herrera, Cadet Quintanilla, and Officer Tingue. He stated that he was specifically located behind the front desk with Faller, and Quintanilla was at the copy machine; the copy machine was approximately 15 feet away from the front desk. He also noted that Tingue was in

the process of escorting a member of the service and he was also in the area of the front desk... Herrera was in front of the desk facing Faller doing arrest processing paperwork.

The Respondent stated that at one point Faller made an inappropriate comment, "something about; where do you buy your panties from." He stated that "at the time, I didn't know exactly who it was (that he was referring to). I determined it was the cadet." He stated that Quintanilla's reaction to Faller's comment "was pretty much shock, something about 'oh, my God.'" Herrera then said to Faller, "you can't ask her that question."

The Respondent did not recall what Faller had stated in response to the statements made towards him. He did notice that after Faller made the comment "he just turned towards me and shrugged his shoulders,... [and] I am looking at him, I said, 'she is what?' He states, 'I am going to buy a gift for my niece.'"

The Respondent also observed that Faller had a newspaper in front of him and that "later when he faced me, it was a Fredericks's woman's magazine, and that's when I determined that he was reading it." He added that he "was offended by the remarks [Faller] made to the cadet and I turned around and I told him, 'why don't you fucking - - why don't you buy Frederick's?'" He stated that while he made the comments towards Faller, he did not make any comments towards Quintanilla.

The Respondent denied that he followed Quintanilla out when she left the desk area and asked her if she was okay. When reminded that she testified that he met with her outside of the command and asked her if she was okay the Respondent denied that the meeting took place. The Respondent also denied having any conversation with Quintanilla that day.

The Respondent further testified that when he told Faller "why don't you fucking go to Frederick's" he did not know if any of the other officers were "still in the vicinity" because "at

that point, everybody was moving away.” The Respondent also stated that when he made that statement to Faller “he looked dumb founded” and the Respondent got up from his place at the desk and left the area.

The Respondent subsequently spoke to Lieutenant Sala about what occurred at the front desk and told him that “an incident occurred, an inappropriate comment made to a cadet at the copy machine. In turn, I turned around and made a comment to him, and I used profanity saying, ‘why don’t you go to Frederick’s, Frederick’s magazine.’”

The Respondent stated that Faller did not approach him later that day to speak with him, nor did he see Faller approach the cadet during the course of that day. The Respondent denied that his comment to Faller was directed to offend the cadet. He also denied that at any point in time did he say she was “a Frederick’s of Hollywood girl” or “she wears Frederick’s of Hollywood underwear.” He further denied that the cadet told him that she was upset by the comment that he made.

The Respondent testified that when he made his comment to Faller the cadet had already left the area, in that “she went around, past the desk around” his left side while he was sitting at the desk and left the area. He further stated that after Herrera told Faller “you can’t say that” she got her paperwork together and left the area, and was not present when the Respondent made his statement to Faller.

The Respondent further testified that during his official Department interview his answers to certain questions prior to the recess were different than the answers he gave after the recess because “when I was questioned, I was nervous, I thought they were referring to me, that I made a comment,” to the cadet. The Respondent further explained that after the recess he realized that the questioning was referring to Faller’s statement and it was then that he told them

that his comment was directed to the lieutenant and to no one else. He further explained that during his interview when they originally asked him about the comment that he made he believed that they were referring to Faller's comment of "what underwear were you wearing."

The Respondent acknowledged that when he was first asked during his interview if he made any statements to Faller he stated no, even though he did in fact make the statement "why don't you go look through the fucking Frederick's." He explained that he referred to Frederick's "because of the magazine that he [Faller] held between the newspaper." He denied that he was ever asked if Faller was reading any magazines and acknowledged that he never mentioned seeing that magazine prior to testifying at trial.

On cross examination, the Respondent reiterated that he did not initially hear the entire statement made by Faller. He just heard him say "where do you buy your panties from" and only heard Faller's statement after he mentioned the cadet's name. He further explained that at the time he did not hear Faller specifically mention Hanes or Victoria Secret. He became aware of those names when he was officially interviewed by Department investigators.

The Respondent further testified that as a PBA Delegate he is a liaison between supervisors and police officers. His position does not include cadets. As a PBA delegate he offers advice to members of the service if the situation warrants it. He noted that as a police officer and not necessarily as a PBA delegate, he is required to report an OEEA violation if he is a witness to one.

The Respondent acknowledged that when Faller made his comment to Quintanilla he did not immediately go and report what he said to Sala; rather, he made his own comment to Faller. He further acknowledged that his comment was to a superior officer and that it was an inappropriate comment to make to a superior officer. When he made his comment to Faller to

the best of his knowledge there were no other police officers in the immediate vicinity to where he was located. He added that Faller did not complain to him with regard to the statement he made to him.

After the Respondent made his comment to Faller, he waited a few seconds before he walked to Sala's office and reported what Faller had said. The Respondent stated that he was never called upon to give information based on him reporting the OEEO situation to Sala. He noted that prior to being served with the charges in this case he did not contact any superior to inquire about or make a complaint with regards to the incident involving Faller's comment.

FINDINGS AND ANALYSIS

The Respondent is charged with making an inappropriate comment to Cadet Quintanilla in the form of "she wears Frederick's of Hollywood underwear," while in the presence of other members of the service. This Court finds the Respondent Not Guilty because it found that Faller's hearsay statements are not credible and lack corroboration from the combined testimony of Quintanilla, Herrera and Tingué.

Faller's hearsay version of what occurred on February 7, 2006 began when he told Soto that the only reason he asked Quintanilla if she was "a Hanes or a Victoria Secret kind of girl?" was because he "wanted that question to inspire her sense of style, almost like putting on your thinking cap" so that she would be able to help him decide what type of gift certificate to buy his niece. He claimed that he has had previous conversations with Quintanilla "about grooming," "his hair cuts," "her clothes, style" and things of that nature. While he specifically asked her about the type of underwear she preferred he claimed that he was not interested in "knowing what kind of underwear she has." He excused his inappropriate statement by equating his

inquiry with that of automobiles -- as though he was talking about cars and was asking her "are you...a Chevy or Cadillac kind of girl." His connection to cars was that "Hanes would be like a Chevy and Victoria Secret would be like a Cadillac..."

While Faller feebly attempted to minimize the intent and effect of his comment to Quintanilla, he placed blame on the Respondent for making a discourteous comment to her. He claimed that the Respondent "interrupting my line of, my conversation with Wendy...I made my statement and he said 'Oh, she's a, ah, Frederick's of Hollywood kind of a girl.'" He went on to characterize the Respondent's statement as "a little racier than um Hanes or Victoria Secret." Faller's story then became even more incredible where he stated that he (Faller), the Respondent, the "girl standing in front" of him and "Wendy herself" all laughed at the Respondent's alleged comment and that no one who was present said anything to him (Faller) about his comments to Quintanilla.

Faller further claimed that the Respondent told him that he spoke to Quintanilla and was told that she took it all as a joke. But Faller proceeded to contradict this statement when he told Soto that Quintanilla subsequently told him that she was offended and spoke to the administrative lieutenant. He then unconvincingly claimed that once he explained to Quintanilla what he meant by his comment she then told him "Oh okay, now it all makes sense."

This Court is convinced that Faller's hearsay statements are not only self serving they were fabricated to avoid taking responsibility for what he said to Quintanilla. His comment to her, standing alone, was an inappropriate, disrespectful inquiry of a personal nature and not a simplistic and innocent equivalent to asking about a type of car. Moreover, since this Court does not find Faller credible about his comments to Quintanilla, it also does not find him credible about any alleged comments he attributed to the Respondent. Rather, this Court finds his

allegations against the Respondent are, again, nothing more than his continued self serving attempt to fabricate a story to take the focus away from the inappropriate comment he made to Quintanilla.

In addition, Faller's hearsay statements are not corroborated by any other evidence presented at trial. Quintanilla, in contrast to Faller's version, testified that she was shocked by Faller's comment where he asked her "Hey Cadet, what type of underwear do you wear, do you wear Hanes or Victoria Secret" and where she told him "That's personal." Herrera, who heard Faller's comment to Quintanilla, described hearing her say "Oh my gosh," and "Oh my God" and in further contrast to his version, then told Faller, "What kind of question is that?" Faller heard Herrera's question and replied "You can tell about a person, about the type of underwear that they wear."

Tingue also heard Faller make a "comment in reference to what kind of underwear Cadet Quintanilla wore," whether it was Hanes or Victoria Secret and described Quintanilla as "shocked" and "her mouth dropped open and she stood up straight and her eyes opened wide." He also heard Herrera make her comment to Faller that he "cannot ask her a question like that..."

The testimony of Quintanilla, Herrera and Tingue clearly contradict the hearsay statements made by Faller and strongly indicate to this Court that he fabricated his version of the incident. More importantly, the comment that Faller attributed to the Respondent, "Oh, she's a, Frederick's of Hollywood kind of a girl" is not corroborated by the evidence presented at trial. Quintanilla did not hear a complete statement from the Respondent and apparently was not offended by what she did hear, as evidenced by the fact that she did not make a formal complaint against him. Herrera and Tingue also did not hear him make an offensive statement and what

Tingue did hear supported the Respondent's version. The only evidence that attempts to definitively attribute an inappropriate comment by the Respondent to Quintanilla is the self serving, incredible hearsay statements made by Faller. Based on all the evidence presented at trial, this Court cannot find that the Respondent made an inappropriate comment to Cadet Wendy Quintanilla.

Accordingly, I find the Respondent Not Guilty as charged.

APPROVED
NOV 15 2008
Raymond W. Kelly
RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,
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Assistant Deputy Commissioner - Trials